MOHD. JALI HJ. NGAH

v.

MOHAMED NOOR HAMID & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. 2881 OF 1978]
3 MAY 1985

CIVIL PROCEDURE: *Application by defendants to have this action dismissed for want of prosecution - Summons-in-chambers prayed for costs of application - Order granted - Fair order provided that costs of the action be taxed - Whether Court has power to amend the order under the slip rule.*

The defendants filed an application to have this action dismissed for want of prosecution pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980. The summons-in-chambers also prayed that the costs of the application be provided for. The defendants' application was granted and the Court made an order that "Application allowed with costs to be taxed".

The fair order provided that the "costs of the action be taxed" and it failed to disclose the name of the Counsel who appeared before the Court for the plaintiff. Being dissatisfied with the manner in which the fair order was extracted as it did not comply with O. 42 r. 8 and that it contained a provision for costs not pleaded for, the plaintiff applied to have the fair order set aside with costs. The mistake relating to the omission of the Counsel's name was not disputed and Counsel for the plaintiff was agreeable to having the order amended to include the name of the Counsel. The provision relating to costs was strongly objected to on the ground that the Court has no power to make any correction after an order has been perfected subject only to such corrections being made pursuant to the slip rule, O. 20 r. 11 of the Rules of the High Court.

Held:

[1] In an application for dismissal of a suit for want of prosecution, the prayer for costs in the event the applications is granted would normally be and should be for costs of the whole action. This stands to reason as the effect of the order when such an application has been granted is to put all proceedings to an end and the costs that naturally follow should be costs for the whole action which includes costs of the application as well.

[2] As the order pertaining to costs was ambiguous in that it did not fully express the intention of the Court that the defendants shall have the costs of the whole action, the Court has the necessary power under O. 20 r. 11 to amend the fair order to include the name of the Counsel and that the defendants shall have the costs of the whole action to be taxed.

[Appeal dismissed.]

Cases referred to:

Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd. [1967] 1 WLR 445
Re Inchcape [1942] 1 Ch 394
Tak Ming Co. v. Yee Sang Metal Supplies Co. [1973] 1 WLR 300
Regina v. Cripps [1984] 1 WLR 53
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 25 r. 1(4), O. 42 r. 8
Rules of the Supreme Court [UK], O. 28 r. 11

For the plaintiff - Patmanathan
For the 1st, 2nd & 3rd defendants - Catherine Leong

JUDGMENT

Siti Norma Yaakob J:

On 1 July 1983, the defendants filed an application to have this action dismissed for want of prosecution pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980, and under the inherent jurisdiction of the Court. The summons in Chambers also prayed that the costs of the application be provided for.

On 25 May 1984, I granted the defendants' application and made an order as follows:

> Application allowed with costs to be taxed.

When drawing up the draft order for approval by the plaintiff's solicitors, the defendants' solicitors made the mistake, which was quite unintentional, of sending the draft order to the plaintiff's former solicitors. When the draft order did not come back to them despite their reminder, the defendants' solicitors proceeded unilaterally to have the draft order perfected. This fair order, the subject matter of the application before me, contained 2 errors,

1. It failed to disclose the name of Mr. Yusuf Khan, Counsel who appeared for the plaintiff before me on 25 May 1984, and
2. the provision for costs is stated as "costs of the action be taxed", clearly not embodying the prayer for costs that was asked for in the application which was "costs of this application".

Being dissatisfied with the manner in which the fair order was extracted as it did not comply with O. 42 r. 8, and that it contained a provision for costs not pleaded for, the plaintiff applied to have the fair order set aside with costs.

The first mistake as stated above is in no way disputed and Counsel for the plaintiff is agreeable to having the order amended to include the name of Mr. Yusuf Khan as Counsel appearing for the plaintiff in the application heard before me on 25 May 1984. However, the provision relating to costs in the fair order is strongly objected to on the ground that the Court has no power to make any correction after an order has been perfected subject only to such corrections being made pursuant to the slip rule, O. 20 r. 11 of the Rules of the High Court, 1980.

In an application for dismissal of a suit for want of prosecution, the prayer for costs in the event the application is granted would normally be and should be for costs of the whole action. This stands to reason as the effect of the order when such an application has been granted is to put all proceedings to an end and the costs that naturally follow should be costs for the whole action which includes costs of the application as well. In this case, the Summons-in-Chambers only asked for costs of the application but was silent as to costs of the whole action. Clearly Counsel who drafted the application had made an error in failing to plead for costs of the action as well. Even at the hearing before me, my attention was not directed to this omission as all arguments were centered on the merits of the application as to whether this was a prayer case for which the action should be dismissed for want of

prosecution. However, I did intimate to both Counsels when this application to set aside the fair order came before me in Chambers for the first time that when I made the order allowing the defendants' application with costs to be taxed, what I had in mind was costs of the whole action to be taxed as it naturally follows that the defendants having succeeded in their application for dismissal of the action brought against them should be granted costs of the whole action as the effect of such an order is to bring all proceedings against them to an end. (See the case of *Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd.* [1967] 1 WLR 445). However, as my order was ambiguous in that it did not state that the costs to be granted was the costs of the whole action, I take part of the blame in failing to express my intention fully and clearly.

In *Re Inchcape* [1942] 1 Ch 394, the same issue was raised when the plaintiffs, being the trustees of a will, failed to ask for costs that were incurred prior to the filing of the summons to determine the domicile of the testator. The Court in that instant held that it being an accidental omission of Counsel that such costs were not provided for, it had the jurisdiction to amend the order made pursuant to the summons to include such costs under RSC O. 28 r. 11 which is in *pari materia* with our O. 20 r. 11. This was subsequently confirmed by the Privy Council in *Tak Ming Co. v. Yee Sang Metal Supplies Co.* [1973] 1 WLR 300.

In *Regina v. Cripps* [1984] 1 WLR 53, the Court held that:

> if a Court has reached a decision which is ambiguously expressed either in the reasoned judgment or in the formal order giving effect to the decision, the ambiguity of expression can be removed in the exercise of the slip rule powers. But the exercise must be limited to correcting an ambiguity in expressing an unambiguous decision.

There is nothing ambiguous about the order relating to the dismissal of the action for want of prosecution but what is ambiguous is the order relating to costs which I have stated earlier is not clearly expressed.

My attention was also drawn to the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FJ held that a Court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it had been drawn except under the slip rule **"so far as it is necessary to correct errors in expressing the intention of the Court**" (Emphasis is mine).

As my order dated 25 May 1984 pertaining to costs was ambiguous in that it did not fully express the intention I had in mind that the defendants shall have the costs of the whole action, I consider that I have the necessary power under O. 20 r. 11 to amend the fair order to include not only Encik Yusuf's name as the Counsel appearing for the plaintiff but that the defendants shall have the costs of the whole action to be taxed and I accordingly make such an order.

In any event, had the draft order in the first place been sent to the correct solicitors for their verification and they had then pointed out the mistakes in the order, the matter would invariably come before me for my verification and I would have made the same order that I now make in the exercise of my powers under the slip rule, O. 20 r. 11.

Also found at [1985] 2 CLJ 151